

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

MAXINE MARTINEZ,

Plaintiff,

v.

COMMISSIONER OF SOCIAL  
SECURITY,<sup>1</sup>

Defendant.

Case No. 1:20-cv-00728-CDB (SS)

ORDER GRANTING PLAINTIFF'S MOTION  
FOR SUMMARY JUDGMENT AND  
REMANDING ACTION FOR FURTHER  
PROCEEDINGS UNDER SENTENCE FOUR  
OF 42 U.S.C. § 405(g)

(Doc. 18)

Maxine Martinez ("Plaintiff") seeks judicial review of a final decision of the Commissioner of Social Security ("Commissioner" or "Defendant") denying her application for disability insurance and supplemental security income benefits under the Social Security Act. (Doc. 1). The matter currently is before the Court on the certified administrative record (Doc. 13) and the parties' briefs, which were submitted without oral argument. (Docs. 18-20).<sup>2</sup> Plaintiff

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<sup>1</sup> On December 20, 2023, Martin O'Malley was named Commissioner of the Social Security Administration. *See* <https://www.ssa.gov/history/commissioners.html>. He therefore is substituted as the defendant in this action. *See* 42 U.S.C. § 405(g) (referring to the "Commissioner's Answer"); 20 C.F.R. § 422.210(d) ("the person holding the Office of the Commissioner shall, in [their] official capacity, be the proper defendant.").

<sup>2</sup> Both parties have consented to the jurisdiction of a magistrate judge for all proceedings in this action, in accordance with 28 U.S.C. § 636(c)(1). (Doc. 12).

1 asserts the Administrative Law Judge (“ALJ”) erred in his analysis of two issues and requests the  
2 decision of the Commissioner be vacated and the case be remanded for the payment of benefits  
3 based on the credit-as-true rule. (Doc. 18 at 19-37).

## 4 I. BACKGROUND

### 5 A. Administrative Proceedings

6 On June 2, 2016, Plaintiff filed an application for benefits pursuant to Title II, Part A of  
7 Title XVIII, and Title XVI of the Social Security Act (the “Act”), 42 U.S.C. § 401 *et seq.*,  
8 alleging a period of disability beginning on April 22, 2016. (Administrative Record (“AR”) at  
9 341-53). Plaintiff was 50 years old on the alleged disability onset date. *Id.* at 341. The  
10 Commissioner denied Plaintiff’s application initially and again on reconsideration. *Id.* at 116-88.  
11 Plaintiff submitted a written request for a hearing by an ALJ on August 14, 2017. *Id.* at 213-15.

12 On March 25, 2019, Plaintiff, represented by counsel, appeared for a hearing before ALJ  
13 Gerald Meyer. *Id.* at 24, 87-115. Vocational Expert (“VE”) Denise Weaver also testified at the  
14 hearing. *Id.* 87, 107-13.

### 15 B. Medical Record

16 The relevant medical record was reviewed by the Court and will be referenced below as  
17 necessary to this Court’s decision.

### 18 C. Hearing Testimony

19 Plaintiff testified she lives in Fresno with her son. *Id.* at 92. Plaintiff noted her son and  
20 daughter drive her because she does not have a car or license. *Id.* at 93. Plaintiff stated she  
21 completed high school and attended trade school. *Id.*

22 Plaintiff testified the last time she had worked was for the Internal Revenue Service  
23 (“IRS”) from 1991 to 2004. *Id.* at 93-94. Plaintiff worked as a clerk, hired and trained new hires,  
24 and worked for 11 months of the year. *Id.* Plaintiff also took care of her husband until he passed  
25 away on February 26, 2005. *Id.* Plaintiff returned to work “back [in] 2006, but the union, they  
26 just told me I could not concentrate. I couldn’t do it anymore.” *Id.* The ALJ determined that  
27 Plaintiff’s past work was too remote in time to be considered. *Id.*

28 Plaintiff testified her daughter takes her to appointments and she takes the bus when she

1 can. *Id.* at 95. Plaintiff stated she takes “like 14 medications” a day and she gets shots every two  
2 weeks. *Id.* at 96. Plaintiff claimed her daughter reminds her to take her medication. *Id.* at 96,  
3 104. Plaintiff testified she has swelling in her feet and has a little problem with her blood sugar.  
4 *Id.* at 96-97.

5 Plaintiff also testified she has trouble breathing and has anxiety attacks. *Id.* at 97.  
6 Plaintiff testified she takes two asthma pumps a day, but if she has an anxiety attack, then the  
7 pumps will not help her, and she ends up going to the hospital. *Id.* at 97, 102. Plaintiff stated she  
8 has an asthma educator to help her with the asthma pumps. *Id.* at 97-98. Plaintiff also sees a  
9 heart doctor because she has an enlarged heart with a hole in it. *Id.* at 98, 101.

10 Plaintiff noted she had gone to the hospital seven or eight times in connection with suicide  
11 attempts. *Id.* at 99-100. Plaintiff stated she has seen a case manager for mental health issues  
12 since 2015. *Id.* at 99. The case manager reminds Plaintiff to take her medications and go to her  
13 appointments. *Id.* at 104. Plaintiff also sees a therapist to address Plaintiff’s drug overdoses. *Id.*  
14 at 105. Plaintiff claims her medications help her relax and sleep at night. *Id.* at 106. Plaintiff  
15 stated she takes naps and watches TV during the day. *Id.* Plaintiff claims she takes medication to  
16 take a nap. *Id.* Plaintiff also asserts she routinely hears voices and noise. *Id.*

17 Plaintiff testified she had trouble breathing even when she did not have a panic attack. *Id.*  
18 at 100. Plaintiff was provided a “gas chamber” by her asthma educator but she sometimes leaves  
19 it at home when she is in a hurry. *Id.* Plaintiff stated she was able to walk to the store where her  
20 son works but she has to stop “like three times” because of spinal or breathing issues. *Id.* at 100-  
21 01.

22 Plaintiff testified she takes medication for anxiety. *Id.* at 103. Plaintiff claims she has  
23 anxiety attacks if she is late for appointments, and she has difficulty being around a lot of people.  
24 *Id.* at 103-04. Plaintiff noted she tries to go out early in the morning with her daughter to avoid  
25 crowds. *Id.* at 104. Plaintiff testified she walks to the grocery store with her daughter and oldest  
26 granddaughter. *Id.*

27 The ALJ proffered a hypothetical to the VE of an individual with the same age, education,  
28 and work experience as Plaintiff who is able to perform light work, and not able to climb ladders,

1 ropes, or scaffolds. *Id.* at 109. The individual can occasionally climb ramps and stairs and  
2 balance on surfaces. *Id.* The individual can frequently, stoop, crouch, kneel, and crawl, can  
3 engage in gross and fine manipulation of objects, lift, and feel with the bilateral upper extremities.  
4 *Id.* The individual can have occasional exposure to irritants, such as fumes, odors, dust, and  
5 gasses, no use of hazardous machines, and no exposure to unshielded moving mechanical parts  
6 and unprotected heights. *Id.* at 109-10. The individual would not be able to drive a motor  
7 vehicle. *Id.* at 110.

8 Further, the individual is able to remember, understand, and carry out only simple and  
9 routine instructions and tasks consistent with specific vocational preparation levels 1 and 2 type  
10 jobs with only simple work-related decisions with few if any workplace changes. *Id.* The  
11 individual can have no interaction with the general public and only occasional interaction with  
12 coworkers and supervisors, with no tandem tasks with coworkers. *Id.* The VE determined that an  
13 individual with such limitations could perform work in several fields, including as a folding  
14 machine operator (DOT #208.685-014), garment sorter (DOT #222.687-014), and routing clerk  
15 (DOT #222.687-022). *Id.*

16 The ALJ proffered a second hypothetical of an individual similar to the first but would  
17 have to be reminded of tasks frequently during an eight-hour workday by her supervisor and that  
18 the individual would require close supervision. *Id.* at 110-11. The VE testified that there would  
19 be no jobs in the national economy for this individual. *Id.* at 111. The ALJ asked the VE if she  
20 concurred that an individual from the first hypothetical was restricted to sedentary work “that  
21 would place...would grid [Plaintiff] under the applicable rules.” *Id.* The VE concurred with the  
22 ALJ. *Id.*

23 Next, the ALJ asked if due to a combination of medical conditions and mental  
24 impairments, a hypothetical individual that would be off task 15 percent or more of the time for  
25 an eight-hour day in addition to regularly scheduled breaks could still work. *Id.* at 111-12. The  
26 VE determined that the individual would be precluded from all work in the national economy. *Id.*  
27 at 112. The ALJ asked if due to a combination of medical conditions and mental impairments, a  
28 hypothetical individual that would have two days of unexcused or unscheduled absences per

1 month could still work. *Id.* at 112-13. The VE held that the individual would be unable to work.  
 2 *Id.* at 112.

3 Plaintiff's counsel proffered a hypothetical of an individual that would need two  
 4 unscheduled breaks in addition to normal breaks of at least 15 minutes each in addition to normal  
 5 breaks. *Id.* at 113. The VE found there would not be work available for that individual. *Id.* The  
 6 VE noted the breaks would require some type of accommodation from the employer, and if no  
 7 accommodation was provided there would be no job available. *Id.*

#### 8 **D. The ALJ's Decision**

9 On June 19, 2019, the ALJ issued a decision finding that Plaintiff was not disabled. *Id.* at  
 10 37-51. The ALJ conducted the five-step disability analysis set forth in 20 C.F.R. § 404.1520(a).  
 11 *Id.* at 40-51. The ALJ found Plaintiff had not engaged in substantial gainful activity since  
 12 January 15, 2006, the alleged onset date (step one). *Id.* at 40.<sup>3</sup> The ALJ held Plaintiff possessed  
 13 the following severe impairment: obesity, disorder of the thoracic and lumbar spine, congestive  
 14 heart failure, plantar fasciitis, chronic pain, anemia, depressive, bipolar, and related disorders with  
 15 psychotic features, anxiety, and post-traumatic stress disorder (step two). *Id.*

16 The ALJ determined Plaintiff did not have an impairment or combination of impairments  
 17 that meets or medically equals the severity of one of the listed impairments in 20 C.F.R. Part 404,  
 18 Subpart P, Appendix 1 ("the Listings") (step three). *Id.* at 40-42. The ALJ held Plaintiff had  
 19 moderate limitations in understanding, remembering, applying information, interacting with  
 20 others, concentrating, persisting, maintaining pace, and adapting or managing oneself. *Id.* The  
 21 ALJ noted Plaintiff endorsed auditory hallucinations and had been hospitalized for psychiatric  
 22 concerns on multiple occasions. *Id.* The ALJ determined Plaintiff's memory was intact, thought  
 23 process organized, cognition normal, she was cooperative and friendly, with good eye contact,  
 24 normal insight, and judgment, adequate social judgment, and she was fully oriented. *Id.* The ALJ  
 25 noted in a function report, that Plaintiff did not allege difficulties, getting along with others,

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27 <sup>3</sup> The ALJ cited the initially alleged onset date; however, as the ALJ noted earlier in his  
 28 opinion, Plaintiff amended the alleged onset date to April 22, 2016, when she moved to dismiss  
 the Title II application. *Id.* 37.

1 remembering, completing tasks, understanding, following instructions, completing tasks,  
2 concentrating, and following instructions. *Id.* at 41.

3 The ALJ then assessed Plaintiff's residual functional capacity ("RFC"). *Id.* at 42. The ALJ  
4 found that Plaintiff retained the RFC:

5 "to perform light work as defined in 20 CFR 404.1567(b) and 416.967(b) except the  
6 individual can never climb ladders, ropes and scaffolds. The individual can  
7 occasionally climb ramps and stairs. The individual can occasionally balance on  
8 narrow, slippery, or erratically moving surfaces. The individual can frequently,  
9 stoop, couch, kneel and crawl. The claimant can handle objects that is gross  
10 manipulation, frequently with the bilateral upper extremities. The claimant can finger,  
11 that is fine manipulation, of items no smaller than the size of paper clip, frequently  
12 with the bilateral upper extremities. The claimant can feel frequently with the  
13 bilateral upper extremities. The individual can have occasional exposure to irritants  
14 such fumes, odors, dust and gasses. The individual can have no use of hazardous  
15 machinery, unshielded moving mechanical parts, and unprotected heights. There  
16 should be no driving of motor vehicles as part of the work function. The individual is  
17 able to remember, understand, and carry out only simple and routine instructions and  
18 tasks consistent with SVP levels 1 and 2 type jobs with only simple, work-related  
19 decisions, with few, if any, work place changes. The individual can have no  
20 interaction with the general public. The individual can have only occasional  
21 interaction with coworkers and supervisors. However, there should be no tandem  
22 tasks with co-workers."

16 *Id.* The ALJ noted Plaintiff testified:

17 "she has swelling in her feet. She can only be on her feet for 10 minutes before  
18 needing to sit down. She is on asthma medications. She also has a hard time breathing  
19 with anxiety. She has an enlarged heart and a hole in her heart. She has attempted  
20 suicide. She has been involuntarily hospitalized for psychiatric concerns. She gets  
21 short of breath when walking. She worries a lot and has ruminating thoughts. Going  
22 to the store or being around a lot of people causes anxiety attacks. She will go places  
early in the morning to avoid crowds. Her daughter or case manager reminds her to  
take medication and about appointments. She has auditory hallucinations. She has to  
take naps during the day[.]"

23 *Id.* at 43. The ALJ acknowledged that while Plaintiff's impairments could reasonably be  
24 expected to cause the alleged symptoms, the ALJ held Plaintiff's statements concerning the  
25 intensity, persistence, and limiting effects of these symptoms were not entirely consistent  
26 with the medical evidence and other evidence in the record. *Id.*

27 In evaluating Plaintiff's heart condition, the ALJ determined Plaintiff had normal  
28 sinus rhythm with normal S1 and S2 without audible click, murmur, thrills, or rubs. *Id.*

1 The ALJ noted Plaintiff's records reflected a 2/6 systolic murmur present at the left lower  
2 sternal border and her second heart sound was split, but without gallop. *Id.* The ALJ found  
3 Plaintiff had "symmetric breath sounds," no wheezes, rhonchi, or rales, and her expiratory  
4 phase was within normal limits, and she had no edema or cyanosis. *Id.* The ALJ  
5 recognized Plaintiff underwent cardiac catheterization on July 25, 2016, which revealed no  
6 angiographic evidence of coronary stenosis, her left ventricular end diastolic pressure was  
7 elevated but she had normal global left ventricular systolic function. *Id.* The ALJ  
8 considered "[s]ubsequent records" that reflected an abnormal left ventricular size with  
9 abnormal systolic thickening with normal systolic function and that her left ventricular  
10 ejection fraction was estimated to be at 30 percent and 41 percent. *Id.*

11 Next, the ALJ evaluated Plaintiff's back pain, plantar fasciitis, and obesity. *Id.* The  
12 ALJ noted that Plaintiff's straight leg raising and "Laseque's sign" were negative. *Id.* The  
13 ALJ found Plaintiff had no muscle spasms, her range of motion was within normal limits in  
14 her back, upper extremities, and lower extremities. *Id.* The ALJ determined Plaintiff's  
15 handgrip was normal, her reflexes were within normal limits and she had good muscle tone  
16 with good active motion. *Id.* The ALJ noted Plaintiff had 5/5 strength in all extremities,  
17 her coordination was intact, gait and balance were normal, she was able to ambulate to the  
18 examination room with assistance, and she was able to sit comfortably on the examination  
19 table without difficulty or evidence of pain. *Id.* The ALJ found imaging revealed  
20 degenerative changes to Plaintiff's lumbar and lower thoracic spine, and she had grade 1  
21 spondylolisthesis in her L4-L5. *Id.* at 43-44. Further, the ALJ considered "SSR 19-2p" in  
22 evaluating Plaintiff's obesity. *Id.* at 44.

23 The ALJ also evaluated Plaintiff's psychological symptoms. *Id.* at 44-45. The ALJ  
24 noted on August 23, 2016, Plaintiff was found by her children on the ground with spilled  
25 medication around her. *Id.* at 44. Plaintiff refused to answer questions and was tearful  
26 when asked if she was trying to hurt herself. *Id.* The ALJ found on examination she was  
27 sleepy but easily roused, oriented to self, and was tearful, aggressive, and angry when  
28 asked why she took so many pills. *Id.* The ALJ recognized subsequent records reflected

1 that she had no thought disturbance, she denied current suicidal or homicidal thoughts, she  
2 was alert, oriented, with good memory, concentration, insight, and judgment. *Id.* The ALJ  
3 found at discharge, Plaintiff had no mood disturbance. *Id.*

4 The ALJ noted Plaintiff was involuntarily held for psychiatric concerns on  
5 November 19, 2016, after reporting a desire to hurt her children. *Id.* The ALJ found on  
6 examination Plaintiff was slow to respond, was tearful, and exhibited thought blocking. *Id.*  
7 Plaintiff's thoughts were disorganized, circumstantial, fragmented, tangential, and she  
8 exhibited impaired judgment. *Id.* The ALJ noted Plaintiff was again hospitalized from  
9 May 8, 2018, through May 10, 2018, after an overdose, which she denied was intentional.  
10 *Id.* Plaintiff was again hospitalized for psychiatric concerns from February 23, 2019,  
11 through February 24, 2019. *Id.*

12 The ALJ found other records that reflected Plaintiff was cooperative, friendly, fully  
13 oriented, had no mood swings or psychotic features, with memory intact, normal cognition,  
14 organized thought processes, good insight, normal and intact judgment, and had average  
15 intelligence. *Id.* The ALJ also recognized the records reflected Plaintiff was described as  
16 suspicious and disorganized, she had trouble completing thoughts and sentences, and was  
17 noted to be non-compliant with her medications. *Id.* at 44-45.

18 The ALJ reviewed Plaintiff's records from a consultative examination performed by  
19 Dr. Farshid Yadegar. *Id.* at 45, 609. The ALJ acknowledged these records described  
20 Plaintiff as clean, appropriate, polite, respectful, and cooperative with good hygiene. *Id.* at  
21 45. The ALJ noted Plaintiff was tearful, sad, and her speech was slow and difficult to  
22 comprehend with a lot of mumbling. *Id.* The ALJ noted Plaintiff was "very tangential,"  
23 her thinking process was difficult to follow and it impacted her speech. *Id.* Plaintiff was  
24 not persistent, her insight was impaired, her memory was poor, and she was disoriented.  
25 *Id.* Plaintiff did not know what state she was in, who the President was, and the date. *Id.*  
26 Plaintiff was able to spell the word "world" after many attempts but could not spell it  
27 backwards. *Id.* Plaintiff was only able to recall 1 of 3 words and she could not focus and  
28 answer questions. *Id.*



1 Further, the ALJ noted Plaintiff endorsed auditory hallucinations and experienced  
2 thought blocking and loose association. *Id.* Plaintiff was not able to follow a 3-step  
3 command or “perform serial 7’s.” *Id.* The ALJ also acknowledged Plaintiff could perform  
4 serial 5s and she was able to spell. *Id.*

5 Next, the ALJ considered Plaintiff’s records from a second consultative  
6 examination performed by Dr. Lance Portnoff. *Id.* at 45, 640. Plaintiff was adequately  
7 groomed, had fair eye contact, and was oriented in time, place, and surroundings. *Id.* at 45.  
8 Plaintiff’s immediate recall was intact, and her thought processes were coherent, but mildly  
9 to moderately concrete and preoccupied. *Id.* The ALJ noted Plaintiff had mild  
10 psychomotor slowing and could only recall 1/3 words after several minutes. *Id.* Plaintiff  
11 did not know the capital of her state, the president, or the location of the Statue of Liberty.  
12 *Id.* Plaintiff was unable to perform simple mathematic calculations, could not count  
13 backwards from 20, and was unable to interpret common proverbs. *Id.* The ALJ found  
14 Plaintiff’s social judgment was adequate and she had adequate insight. *Id.*

15 The ALJ assigned little weight to the opinion of Dr. Yadegar. *Id.* The ALJ  
16 determined “[w]hile [Plaintiff’s] performance on [the] consultative examination supports  
17 the examiner’s limitations and concerns, the totality of the evidence received at the hearing  
18 level is not consistent with these limitations over a longitudinal period.” *Id.* The ALJ  
19 noted Plaintiff was generally described as fully oriented, her thought processes were  
20 organized, cognition was normal, and her memory was intact. *Id.* The ALJ found that  
21 Plaintiff retained the capacity to remember, understand, and carry out only simple and  
22 routine instructions and tasks consistent with SVP levels 1 and 2 type jobs. *Id.* Further, the  
23 ALJ determined Plaintiff’s insight and judgment were normal. *Id.* The ALJ stated Plaintiff  
24 retained the capacity for only simple, work-related decisions, and jobs with few, if any,  
25 workplace changes. *Id.* The ALJ noted Plaintiff was cooperative, had good eye contact,  
26 and was friendly. *Id.* at 45-46. The ALJ held Plaintiff can have only occasional interaction  
27 with coworkers and supervisors but with no tandem tasks with coworkers. *Id.* at 46.

28 The ALJ assigned partial weight to the opinion of Dr. Portnoff to the extent it was

1 consistent with the totality of the evidence received at the hearing level. *Id.* The ALJ then  
2 repeated word-for-word the same reasoning and cited the same exhibits he provided in  
3 evaluating Dr. Yadegar's opinion. *Id.* at 45-46.

4 The ALJ assigned little weight to the opinion of a physical medicine consultative  
5 examiner, Dr. Mickey Sachdeva. *Id.* at 46, 597. The ALJ held "[w]hile [Dr. Sachdeva]  
6 supported his opinion with an explanation, the totality of the evidence [was] consistent with  
7 further limitations." *Id.* at 46. The ALJ noted Plaintiff had good muscle tone with good  
8 active motion, she had 5/5 strength in all extremities and her gait and balance were normal.  
9 *Id.* The ALJ found Plaintiff was able to sit comfortably on the examination table without  
10 difficulty or evidence of pain. *Id.* The ALJ then largely recited his RFC finding. *See id.*

11 The ALJ assigned little weight to the opinion of Plaintiff's provider, Dr. Mario  
12 Ochoa. *Id.* The ALJ concluded summarily that Dr. Ochoa's opinions were inconsistent  
13 with the totality of the evidence received at the hearing level. *Id.* at 46-47. The ALJ then  
14 repeated word-for-word the same reasoning and cited the same exhibits he provided in  
15 discounting Dr. Sachdeva's opinion. *Id.* at 47.

16 The ALJ assigned little weight to the opinions of Plaintiff's provider Nurse  
17 Practitioner ("NP") Angela Desai. *Id.* The ALJ concluded summarily that NP Desai's  
18 opinions were inconsistent with the totality of the evidence received at the hearing level.  
19 *Id.* The ALJ then repeated word-for-word the same reasoning and cited the same exhibits  
20 he provided in evaluating Drs. Yadegar and Portnoff's opinions. *Id.*

21 The ALJ assigned partial weight to the opinion of Dr. Jack Lebeau to the extent it  
22 was consistent with the totality of the evidence received at the hearing level. *Id.* The ALJ  
23 then repeated word-for-word the same reasoning and cited the same exhibits he provided in  
24 evaluating Drs. Sachdeva and Ochoa's opinions. *Id.* at 47-48.

25 The ALJ assigned partial weight to the opinion of Dr. Ann Monis to the extent it  
26 was consistent with the totality of the evidence received at the hearing level. *Id.* at 48.  
27 The ALJ then repeated word-for-word the same reasoning and cited the same exhibits he  
28 provided in evaluating Drs. Yadegar, Portnoff, and NP Desai's opinions. *Id.*

1 The ALJ assigned partial weight to the opinions of the state agency psychological  
2 consultants Drs. H. Amadol and Heather M. Abrahimi to the extent consistent with the  
3 totality of the evidence received at the hearing level. *Id.* The ALJ then repeated word-for-  
4 word the same reasoning and cited the same exhibits he provided in evaluating Drs.  
5 Yadegar, Portnoff, Monis, and NP Desai's opinions. *Id.* at 48-49.

6 The ALJ assigned little weight to the opinions of the state agency medical  
7 consultants Drs. R. Betcher and G. Dale. *Id.* at 49. The ALJ found the record was  
8 sufficient to establish severe physical impairments. *Id.* The ALJ noted Plaintiff's left  
9 ventricular end diastolic pressure was elevated, and she had an abnormal left ventricular  
10 size with abnormal systolic thickening. *Id.* The ALJ also noted Plaintiff's left ventricular  
11 ejection fraction was estimated to be 30 percent, imaging revealed degenerative changes of  
12 the lumbar and lower thoracic spine and there was grade 1 spondylolisthesis at L4-L5. *Id.*

13 The ALJ assigned little weight to the opinions of Plaintiff's son, Tomas Martinez.  
14 *Id.* The ALJ noted Mr. Martinez reported Plaintiff's impairments affected her ability to  
15 lift, squat, walk, kneel, and climb stairs. *Id.* The ALJ determined Mr. Martinez's  
16 "statement was considered in terms of understanding the severity of Plaintiff's physical and  
17 mental impairments, but has been given little weight, as it is a lay opinion based upon  
18 casual observation, rather than objective medical examination and testing." *Id.* The ALJ  
19 also held Mr. Martinez's opinion did not outweigh the medical evidence regarding the  
20 extent to which Plaintiff's impairments limited her functional abilities. *Id.* Specifically,  
21 the ALJ found examinations showing 5/5 strength and a normal gait "to be more persuasive  
22 in this regard." *Id.*

23 The ALJ held that the RFC assessment was supported by the record when  
24 considered as a whole. *Id.* The ALJ asserted the objective medical and opinion evidence  
25 suggested greater sustained capacity than described by Plaintiff. *Id.* The ALJ determined  
26 that Plaintiff had no past relevant work (step four) but could perform a significant number  
27 of other jobs in the national economy, including folding machine operator, garment sorter,  
28 and routing clerk (step five). *Id.* at 49-50. The ALJ concluded Plaintiff has not been under

1 a disability as defined in the Act. *Id.* at 50-51.

## 2 **E. The Appeals Council's Decision**

3 On March 23, 2020, the Appeals Council denied Plaintiff's request for review, making the  
4 ALJ's decision the final decision of the Commissioner. *Id.* at 4-10. Plaintiff filed this action on  
5 May 22, 2020, seeking judicial review of the denial of her application for benefits. (Doc. 1). The  
6 Commissioner lodged the administrative record on April 12, 2021. (Doc. 13). Plaintiff filed an  
7 opening brief on July 16, 2021. (Doc. 18). On August 16, 2021, Defendant filed a responsive  
8 brief and Plaintiff filed a reply on August 31, 2021. (Docs. 19-20).

## 9 **II. LEGAL STANDARD**

### 10 **A. The Disability Standard**

11 Disability Insurance Benefits and Supplemental Security Income are available for every  
12 eligible individual who is "disabled." 42 U.S.C. §§ 402(d)(1)(B)(ii) and 1381(a). An individual  
13 is "disabled" if unable to "engage in any substantial gainful activity by reason of any medically  
14 determinable physical or mental impairment ..." <sup>4</sup> *Bowen v. Yuckert*, 482 U.S. 137, 140 (1987)  
15 (quoting identically worded provisions of 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A)). To  
16 achieve uniformity in the decision-making process, the Social Security regulations set out a five-  
17 step sequential evaluation process to be used in determining if an individual is disabled. *See* 20  
18 C.F.R. § 404.1520; *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1194 (9th Cir. 2004).  
19 Specifically, the ALJ is required to determine:

20 (1) whether a claimant engaged in substantial gainful activity during the period of  
21 alleged disability, (2) whether the claimant had medically determinable "severe"  
22 impairments, (3) whether these impairments meet or are medically equivalent to one  
23 of the listed impairments set forth in 20 C.F.R. § 404, Subpart P, Appendix 1, (4)  
24 whether the claimant retained the RFC to perform past relevant work and (5)  
whether the claimant had the ability to perform other jobs existing in significant  
numbers at the national and regional level.

25 *Stout v. Comm'r. Soc. Sec. Admin.*, 454 F.3d 1050, 1052 (9th Cir. 2006). The burden of proof is

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26 <sup>4</sup> A "physical or mental impairment" is one resulting from anatomical, physiological, or  
27 psychological abnormalities that are demonstrated by medically acceptable clinical and laboratory  
28 diagnostic techniques. 42 U.S.C. § 423(d)(3).

on a claimant at steps one through four. *Ford v. Saul*, 950 F.3d 1141, 1148 (9th Cir. 2020) (citing *Valentine v. Comm’r of Soc. Sec. Admin*, 574 F.3d 685, 689 (9th Cir. 2009)).

Before making the step four determinations, the ALJ first must determine the claimant’s RFC. 20 C.F.R. § 416.920(e). The RFC is the most a claimant can still do despite their limitations and represents an assessment based on all relevant evidence. 20 C.F.R. §§ 404.1545(a)(1); 416.945(a)(1)). The RFC must consider all of the claimant’s impairments, including those that are not severe. 20 C.F.R. § 416.920(e); § 416.945(a)(2). *E.g.*, *Wells v. Colvin*, 727 F.3d 1061, 1065 (10th Cir. 2013) (“These regulations inform us, first, that in assessing the claimant’s RFC, the ALJ must consider the combined effect of all of the claimant’s medically determinable impairments, whether severe or not severe.”). The RFC is not a medical opinion. 20 C.F.R. § 404.1527(d)(2). Rather, it is a legal decision that is expressly reserved to the Commissioner. 20 C.F.R. § 404.1546(c); *see Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001) (“[I]t is the responsibility of the ALJ, not the claimant’s physician, to determine residual functional capacity.”).

At step five, the burden shifts to the Commissioner to prove that Plaintiff can perform other work in the national economy given the claimant’s RFC, age, education, and work experience. *Garrison v. Colvin*, 759 F.3d 995, 1011 (9th Cir. 2014). To do this, the ALJ can use either the Medical-Vocational Guidelines or rely upon the testimony of a VE. *Lounsbury v. Barnhart*, 468 F.3d 1111, 1114 (9th Cir. 2006); *Osenbrock v. Apfel*, 240 F.3d 1157, 1162 (9th Cir. 2001). “Throughout the five-step evaluation, the ALJ ‘is responsible for determining credibility, resolving conflicts in medical testimony and for resolving ambiguities.’” *Ford*, 950 F.3d at 1149 (quoting *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995)).

### **B. Standard of Review**

Congress has provided that an individual may obtain judicial review of any final decision of the Commissioner of Social Security regarding entitlement to benefits. 42 U.S.C. § 405(g). In determining whether to reverse an ALJ’s decision, a court reviews only those issues raised by the party challenging the decision. *See Lewis v. Apfel*, 236 F.3d 503, 517 n.13 (9th Cir. 2001). A court may set aside the Commissioner’s denial of benefits when the ALJ’s findings are based on

1 legal error or are not supported by substantial evidence. *Tackett v. Apfel*, 180 F.3d 1094, 1097  
 2 (9th Cir. 1999).

3 “Substantial evidence is relevant evidence which, considering the record as a whole, a  
 4 reasonable person might accept as adequate to support a conclusion.” *Thomas v. Barnhart*, 278  
 5 F.3d 947, 954 (9th Cir. 2002) (quoting *Flaten v. Sec’y of Health & Human Servs.*, 44 F.3d 1453,  
 6 1457 (9th Cir. 1995)). “[T]he threshold for such evidentiary sufficiency is not high.” *Biestek v.*  
 7 *Berryhill*, 139 S. Ct. 1148, 1154 (2019). Rather, “[s]ubstantial evidence means more than a  
 8 scintilla, but less than a preponderance; it is an extremely deferential standard.” *Thomas v.*  
 9 *CalPortland Co.*, 993 F.3d 1204, 1208 (9th Cir. 2021) (internal quotations and citations omitted).

10 “[A] reviewing court must consider the entire record as a whole and may not affirm  
 11 simply by isolating a specific quantum of supporting evidence.” *Hill v. Astrue*, 698 F.3d 1153,  
 12 1159 (9th Cir. 2012) (internal quotations and citations omitted). “If the evidence ‘is susceptible  
 13 to more than one rational interpretation, it is the ALJ’s conclusion that must be upheld.’” *Ford*,  
 14 950 F.3d at 1154 (quoting *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005)). Even if the  
 15 ALJ has erred, the Court may not reverse the ALJ’s decision where the error is harmless. *Stout*,  
 16 454 F.3d at 1055-56. An error is harmless where it is “inconsequential to the [ALJ’s] ultimate  
 17 nondisability determinations.” *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008)  
 18 (quotation and citation omitted). The burden of showing that an error is not harmless “normally  
 19 falls upon the party attacking the agency’s determination.” *Shinseki v. Sanders*, 556 U.S. 396,  
 20 409 (2009).

### 21 III. LEGAL ISSUES

22 Plaintiff asserts the ALJ committed harmful error by failing to defer and afford “greatest  
 23 weight” to the medical source statements of consultative examiner Dr. Yadegar, treating  
 24 physician Dr. Ochoa, and treating NP Desai, “absent the requisite ‘specific and legitimate’  
 25 reasons.” (Doc. 18 at 6, 19-33). Plaintiff also argues the ALJ committed harmful error by failing  
 26 to provide “clear and convincing” reasons for rejecting Plaintiff’s symptomology evidence. *Id.* at  
 27 6, 33-37.  
 28

#### IV. DISCUSSION

##### A. Whether the ALJ committed harmful error by failing to afford “greatest weight” to the opinions of Drs. Yadegar, Ochoa, and NP Desai.

For Social Security disability cases filed before March 27, 2017, the weight to be given to medical opinions depends in part on whether the opinions are proffered by treating, examining, or nonexamining health professionals.<sup>5</sup> *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995); *Fair v. Bowen*, 885 F.2d 597, 604 (9th Cir. 1989). “As a general rule, more weight should be given to the opinion of a treating source than to the opinion of doctors who do not treat the claimant...” as a treating doctor is employed to cure and has a greater opportunity to know and observe the patient as an individual. *Lester*, 81 F.3d at 830; *Smolen v. Chater*, 80 F.3d 1273, 1285 (9th Cir. 1996); *Bates v. Sullivan*, 894 F.2d 1059, 1063 (9th Cir. 1990); *Cf. Pitzer v. Sullivan*, 908 F.2d 502, 506, n.4 (9th Cir. 1990) (the least weight is given to the opinion of a non-examining professional).

The uncontradicted opinion of a treating or examining physician may be rejected only for clear and convincing reasons supported by substantial evidence in the record. *Lester*, 81 F.3d at 831. The opinion of a treating or examining physician that is controverted by another doctor may be rejected only for specific and legitimate reasons supported by substantial evidence in the record. *Id.* Specific and legitimate reasons require the ALJ to set out a detailed and thorough summary of the facts and conflicting clinical evidence, state his/her interpretation of the evidence, and make a finding. *Magallanes v. Bowen*, 881 F.2d 747, 751-55 (9th Cir. 1989); *see Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (“The ALJ must do more than offer his conclusions. He must set forth his interpretations and explain why they, rather than the doctors’, are correct.”). Absent specific and legitimate reasons, the ALJ must defer to the opinion of a treating or

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<sup>5</sup> Effective March 27, 2017, Revisions to Rules Regarding the Evaluation of Medical Evidence removed provisions extending *per se* preferential status to opinions of treating physicians. Because Plaintiff’s application was filed prior to March 27, 2017 (AR at 341-53) and not decided until after that date, 20 C.F.R. §§ 404.1527(c) and 416.927(c) apply and required the ALJ to extend preferential status to treating as compared to non-treating medical sources. *See, e.g., Chessani v. Saul*, No. 2:20-cv-0082 DB, 2021 WL 916198, at \*3 n.3 (E.D. Cal. Mar. 10, 2021) (citing *Edinger v. Saul*, 432 F. Supp. 3d 516, 530 & n.16 (E.D. Pa. 2020)).



1 examining physician. *See Lester*, 81 F.3d at 830-31.

2 1. Dr. Yadegar

3 Plaintiff was seen by Dr. Yadegar on September 7, 2016. AR at 605-09. Dr. Yadegar  
4 documented Plaintiff claimed she had difficulty focusing, her neighbors were bothering her, she  
5 had anxiety attacks, was taking too many sleeping pills while drinking alcohol, and was taken for  
6 psychiatric hospitalizations. *Id.* Dr. Yadegar noted Plaintiff mentioned she had been homeless on  
7 and off. *Id.* Plaintiff “just got a place, but she is behind in rent for two months” and she was still  
8 grieving her husband’s loss. *Id.* Dr. Yadegar identified Plaintiff was taking Remeron and  
9 Fluoxetine for a few years, but Plaintiff was unable to provide the exact date she started the  
10 medication. *Id.*

11 Dr. Yadegar noted Plaintiff was hospitalized in 2005, at Community Behavioral Health  
12 Center (“Community”) for danger to herself around the time when her husband died. *Id.* at 606.  
13 Plaintiff was again hospitalized at Community on August 23, 2016, for danger to herself. *Id.* Dr.  
14 Yadegar noted “[i]n the report that she brought with her, it said ‘I don’t want to live anymore’”  
15 and “[s]he wanted to hurt herself.” *Id.*

16 Dr. Yadegar reviewed her family, social, and employment history. *Id.* Dr. Yadegar noted  
17 Plaintiff was using alcohol up until August 25, 2016, but Plaintiff believed she was not addicted.  
18 *Id.* Dr. Yadegar also discussed Plaintiff’s activities of daily living. *Id.* Dr. Yadegar noted “[s]he  
19 can do pretty much [*sic*] around the house” but when her feet hurt, she can’t walk very long, gets  
20 tired, and starts to have anxiety thinking she won’t be able to get to her destination. *Id.*

21 Dr. Yadegar found Plaintiff was clean, and appropriate with good hygiene. *Id.* Dr.  
22 Yadegar determined Plaintiff was polite, respectful, cooperative, pleasant, “but very tearful, very  
23 sad.” *Id.* Dr. Yadegar stated her mood and affect was extremely sad and depressed, although she  
24 denied feeling suicidal and homicidal at the examination. *Id.* Dr. Yadegar noted Plaintiff’s  
25 speech was slow, mumbled, and difficult to comprehend sometimes. *Id.* at 607. Dr. Yadegar  
26 determined Plaintiff was “very tangential” and her thinking process was “really difficult to follow  
27 her speech and she elaborates that she gets lost in her own thoughts impacting her speech.” *Id.*

28 Next, Dr. Yadegar noted Plaintiff claimed she experienced auditory hallucinations when



1 she was depressed and when she was around people. *Id.* Dr. Yadegar found Plaintiff could not  
2 really tell him clearly what she was hearing and was “very vague.” *Id.* Dr. Yadegar reported  
3 Plaintiff stated, “the voices tell her sometimes let go of her husband, get over it and she  
4 mentioned that she can’t.” *Id.* Dr. Yadegar found Plaintiff had to rely on a list to remember what  
5 medication to take and not to take. *Id.* Plaintiff reported feeling 8/10 in regard to feeling  
6 depressed and anxious. *See id.* (“Depression being 10, 1 being happy... 10 being the worse  
7 anxiety, 1 being no anxiety at all”).

8 Dr. Yadegar determined Plaintiff was oriented to place but she did not know what state she  
9 was in, the president, or “today’s date.” *See id.* (“I have been sleeping a lot, I cannot remember  
10 today’s date. I think we are in September or August.”). Dr. Yadegar found Plaintiff only knew  
11 her date of birth and the purpose of the visit. *Id.* Dr. Yadegar reported Plaintiff was “definitely  
12 disoriented.” *Id.*

13 Dr. Yadegar noted Plaintiff could spell the word “world” after many attempts but was  
14 unable to spell it backward. *Id.* Plaintiff did not have her address or phone number memorized.  
15 *Id.* Dr. Yadegar found Plaintiff’s memory was impaired, that “she is oriented,” and that he had  
16 major concerns with her cognition. *Id.* Dr. Yadegar determined Plaintiff could not focus and  
17 answer questions, she had thought blocking, loose association, and her mind was defragmented  
18 and confused. *Id.* Further, Dr. Yadegar reported Plaintiff could perform calculations but had  
19 difficulties in concentration, abstract thinking, similarities/differences, and with judgment/insight.  
20 *Id.* at 608.

21 Dr. Yadegar stated Plaintiff’s condition “is problematic, so it is very concerning...I am  
22 very concerned and I do like her to see someone for the intellectual abilities, possibly some form  
23 of treatment that she can go to.” *Id.* at 607-08. Dr. Yadegar held Plaintiff “definitely needs some  
24 form of case management, someone to help her with finances, someone to help her with  
25 managing her daily living situation.” *Id.* at 608. Dr. Yadegar warned without support Plaintiff  
26 could become homeless again and could end up hurting herself. *Id.* Dr. Yadegar noted Plaintiff  
27 has children but did not know how much they could help her. *Id.*

28 Dr. Yadegar diagnosed Plaintiff with a not otherwise specified (“NOS”) depressive

1 disorder, and a NOS anxiety disorder. *Id.* Dr. Yadegar “rule[d] out cognitive, as well as,  
2 intellectual disability difficult, challenges” and alcohol dependence. *Id.* Dr. Yadegar referred  
3 Plaintiff to the “Department of Mental Health just in case she became depressed again and wants  
4 to hurt herself and some kind of support system would definitely be good for her.” *Id.*

5 Dr. Yadegar concluded Plaintiff’s prognosis was not good as she had a lot of difficulties  
6 and various challenges, in her life. *See id.* at 608-09 (“She is taking her medications really well,  
7 but restraining herself and accomplishing tasks is very difficult for her.”). Dr. Yadegar again  
8 noted Plaintiff would benefit from some support from a case manager. *Id.* at 608.

9 Dr. Yadegar noted Plaintiff was not capable of managing her funds and stated Plaintiff  
10 was mildly impaired in her ability to perform simple and repetitive tasks. *Id.* at 609. Dr. Yadegar  
11 found Plaintiff was moderately impaired in her ability to handle instructions from a supervisor.  
12 *Id.* Dr. Yadegar determined Plaintiff was markedly impaired in her ability:

13 “to perform detailed and complex tasks, interact with co-workers and the public, to perform  
14 work activities on a consistent basis without special or additional instruction, to maintain  
15 regular attendance in the workplace, to complete a normal workday/workweek without  
16 interruptions from a psychiatric condition, and deal with the usual stress encountered in the  
work place.”

17 *Id.* Dr. Yadegar concluded he had “never given this kind of rating, so this is really alarming, it is  
18 very concerning to me.” *Id.*

19 As discussed above, the ALJ assigned little weight to the opinion of Dr. Yadegar because  
20 “the totality of the evidence received at the hearing level is not consistent with these limitations  
21 over a longitudinal period.” *Id.* at 45.

22 Plaintiff argues the ALJ failed to provide specific and legitimate reasons to discount Dr.  
23 Yadegar’s opinion. (Doc. 18 at 20). Plaintiff asserts the ALJ used the “same, cherry-picked  
24 language, verbatim” to reject Dr. Yadegar’s opinion as he did with five other opinions. (Docs. 18  
25 at 20, 22; 20 at 3-5). Plaintiff contends the ALJ mischaracterized the record by highlighting  
26 negative findings of psychological impairment taken during gynecological examinations and  
27 failing to address “extensive” positive findings of psychological impairment, Plaintiff’s non-  
28

1 conservative treatment, and Plaintiff's hospitalizations. (Docs. 18 at 22-25, 27; 20 at 7, 9-10).  
2 Additionally, Plaintiff argues the ALJ erred in failing to address "the extensive, specific, and  
3 rather ominous" findings of Dr. Yadegar. (Docs. 18 at 24; 20 at 7).

4 In response, Defendant claims the ALJ's findings were based on a reasonable  
5 interpretation of the record and supported by Dr. Monis' opinion. (Doc. 19 at 8-9). Defendant  
6 asserts the ALJ considered both the positive and negative mental status findings. *Id.* at 9.  
7 Defendant contends the longitudinal record cited by the ALJ showed Dr. Yadegar's opinion was  
8 not supported by the generally normal exam findings. *Id.* Defendant avers "Plaintiff's contention  
9 that the ALJ could not rely on mental status findings in records where she received treatment for  
10 physical impairments is incorrect." *Id.*

11 The Court finds the ALJ has failed to provide specific and legitimate reasons to discount  
12 examining physician, Dr. Yadegar's opinion. As detailed above (*supra* 9-11), the ALJ assigned  
13 little weight to Dr. Yadegar and NP Desai's opinions and partial weight to Drs. Portnoff, Monis,  
14 Amadol, and Abrahimi. Despite the differences in the assigned weight and the inherent  
15 differences within the opinions, the ALJ provided alternating versions of a "boilerplate"  
16 explanation for all six opinions. The ALJ's reliance on identical reasoning for addressing all six  
17 opinions "tends to indicate that the ALJ used standard boilerplate language to address [the]  
18 opinions irrespective of their individual content." *Deleon v. Saul*, No. CV 19-1687-GSA, 2021  
19 WL 63336, at \*5 (E.D. Cal. Jan. 7, 2021). Particularly given the ALJ's summary and conclusory  
20 discounting of the physicians' opinions (including those of Dr. Yadegar), the ALJ's recitation of  
21 boilerplate language is not sufficiently specific. *Id.* (citing *Garrison*, 759 F.3d at 1013) (noting  
22 that the specific and legitimate reasoning standard is not satisfied where the ALJ uses "boilerplate  
23 language that fails to offer a substantive basis for his conclusion.").

24 To take one example, the ALJ summarily discounted the opinions of Drs. Yadegar and  
25 Portnoff and cited as support the same, verbatim listing of more favorable and generalized  
26 assessments of Plaintiff's medical examinations. AR 45-46. However, the two opinions offered  
27 unique insights and perspective – including, as to Dr. Yadegar, Plaintiff's endorsement of  
28 auditory hallucinations – yet the ALJ's opinion offers no indication that he gave individualized

1 consideration to the examining doctors' assessments. Accordingly, the ALJ has failed to provide  
2 a specific reason to discount Dr. Yadegar's opinion.

3       Next, the Court holds Plaintiff failed to provide legitimate reasons to discount Dr.  
4 Yadegar's opinion. As Plaintiff acknowledges, an ALJ may properly review and consider mental  
5 impairments addressed in medical records documenting a patient's treatment for physical  
6 impairments. *See* (Doc. 20 at 6) ("The Defense mischaracterizes the argument in Pl. Br. by  
7 opining, incorrectly, that Ms. Martinez's contention was that 'the ALJ could not rely on mental  
8 status findings in records where she was receiving treatment for physical impairments.'").  
9 However, it is equally true that an ALJ may not "cherry-pick" negative findings of mental  
10 impairment and ignore positive findings of mental impairment. *See Holohan v. Massanri*, 246  
11 F.3d 1195, 1207 (9th Cir. 2001) (reversing where the ALJ "selectively relied on some entries [in  
12 the plaintiff's treatment records] and ignored the many others that indicated continued, severe  
13 impairment.").

14       As discussed above, the ALJ cited exhibits that showed Plaintiff was oriented (AR at 559,  
15 666, 952), she had normal insight and judgment (*id.* at 677, 679, 952, 954, 956), intact memory  
16 (*id.* at 560, 666, 986), she was cooperative (*id.* at 559, 666, 677, 679), had good eye contact (*id.* at  
17 679, 952, 956), and was friendly (*id.* at 954). However, those same exhibits also provided  
18 positive findings of mental impairment that the ALJ did not address when discounting Dr.  
19 Yadegar's opinion. *See* AR at 677, 679, 952, 954, 956. Specifically, Plaintiff's thought content  
20 was helpless/hopeless, had hallucinations, she was anxious and depressed, and she suffered from  
21 liable, blunt, and flat affect. *Id.* The ALJ's failure to address these positive findings of mental  
22 impairment, while citing negative examples from the same exhibits, demonstrates the ALJ  
23 impermissibly relied on evidence from the record selectively.

24       Further, the Court holds the ALJ erred in discounting Dr. Yadegar's opinion without  
25 discussing his conclusion relating to severity. Following his examination, Dr. Yadegar found  
26 Plaintiff was markedly impaired in six different categories. *Supra* 18. Dr. Yadegar concluded, "I  
27 never [have] given this kind of rating, so this is really alarming, it is very concerning to me." AR  
28 at 609. An ALJ is not required to discuss all evidence that is presented, but unquestionably must

1 explain why significant probative evidence has been rejected. *Vincent v. Heckler*, 739 F.2d 1393,  
2 1395 (9th Cir. 1984) (citation omitted); see *Matthew A. B. v. Berryhill*, No. 3:18-cv-05531-DWC,  
3 2019 WL 1594363, at \*4 (W.D. Wash. Apr. 15, 2019) (“[T]he ALJ’s description of Dr. Koch’s  
4 evaluation overlooks abnormal findings which may support her opined limitations.”). Here, the  
5 ALJ’s failure to even note Dr. Yadegar’s disconcerting conclusion (*see generally id.* at 37-51)  
6 constitutes a striking omission from the ALJ’s opinion. Under these circumstances, the Court  
7 cannot find that the ALJ provided specific and legitimate reasons supported by substantial  
8 evidence to discount Dr. Yadegar’s opinion.

9 2. Dr. Ochoa

10 Plaintiff was seen by Dr. Ochoa between July 8, 2015, and February 16, 2019. AR at 532-  
11 36, 552-53, 959-67). Dr. Ochoa treated Plaintiff for left foot pain, cough, chest pain, swelling,  
12 abnormal uterine bleeding, chronic back pain, shortness of breath, and anxiety. *Id.*

13 On September 14, 2017, Dr. Ochoa completed a physical medical source statement for  
14 Plaintiff. *Id.* at 645-48. Dr. Ochoa diagnosed Plaintiff with foot pain, musculoskeletal pain,  
15 asthma, and hypertension. *Id.* at 645. Dr. Ochoa noted Plaintiff experienced pain, fatigue,  
16 tenderness, stiffness, depression, and anxiety. *Id.* Dr. Ochoa found Plaintiff’s impairments had  
17 not lasted or were not expected to last at least twelve months. *Id.*

18 Dr. Ochoa estimated Plaintiff could walk one city block without rest or severe pain. *Id.*  
19 Dr. Ochoa noted Plaintiff could sit 45 minutes before needing to get up and stand 20 minutes  
20 before needing to sit down or walk around. *Id.* Dr. Ochoa found Plaintiff could sit for about four  
21 hours and stand/walk about two hours total in an eight-hour workday (with normal breaks). *Id.*  
22 Dr. Ochoa held Plaintiff would need a job that permits shifting positions at will from sitting,  
23 standing, or walking. *Id.* Dr. Ochoa determined Plaintiff would need to walk around during an  
24 eight-hour workday every 30 minutes for 10 minutes each time. *Id.* at 646.

25 Dr. Ochoa found Plaintiff would sometimes need to take unscheduled 15-minute breaks  
26 during a workday every one to two hours. *Id.* Dr. Ochoa stated Plaintiff’s chronic fatigue, pain/  
27 paresthesias, and numbness caused a need for these breaks. *Id.* Dr. Ochoa determined Plaintiff  
28 could lift and carry in a competitive work situation less than 10 pounds occasionally, 10 pounds

1 occasionally, 20 pounds rarely, and 50 pounds never. *Id.* Dr. Ochoa found Plaintiff could rarely  
2 twist, and occasionally stoop/bend, crouch/squat, climb stairs, and climb ladders. *Id.* Dr. Ochoa  
3 noted Plaintiff could use her hands/fingers/arms to grasp, turn, twist objects, engage in fine  
4 manipulations, and reach in front of the body and overhead, 80% of an eight-hour workday. *Id.* at  
5 647.

6 Dr. Ochoa estimated Plaintiff was likely to be off task 20% of the time during a typical  
7 workday. *Id.* Dr. Ochoa reported Plaintiff was capable of low-stress work and she was likely to  
8 have “good days” and bad days.” *Id.* Dr. Ochoa determined Plaintiff was likely to be absent  
9 from work more than four days per month. *Id.* Dr. Ochoa found Plaintiff could walk a block at a  
10 reasonable place on rough or uneven surfaces, use standard public transportation, grocery, and  
11 clothes shop, go to the bank, and climb stairs at a reasonable pace with use of only a single  
12 handrail. *Id.* Dr. Ochoa affirmed that Plaintiff’s impairments, demonstrated by signs, clinical  
13 findings, and laboratory or test results were reasonably consistent with the functional limitations  
14 he provided. *Id.* at 648. Dr. Ochoa reiterated that Plaintiff could not sit, stand, or walk too long  
15 due to pain. *Id.*

16 On October 27, 2018, Dr. Ochoa completed a second physical medical source statement  
17 for Plaintiff. *Id.* at 896-99. Dr. Ochoa diagnosed Plaintiff with chronic renal failure,  
18 hypertension, asthma, and chronic pain. *Id.* at 896. Dr. Ochoa determined Plaintiff had 9/10  
19 stabbing pain on the back of her legs, stiffness in her hands and fingers, and reduced sensation in  
20 her right leg. *Id.* Dr. Ochoa concluded Plaintiff’s impairments had lasted or were expected to last  
21 at least 12 months and that Plaintiff’s “bipolar disease” affected her physical condition. *Id.*

22 Dr. Ochoa estimated Plaintiff could walk half of a city block without rest or severe pain.  
23 *Id.* Dr. Ochoa noted Plaintiff could sit 30 minutes before needing to get up and stand 10 minutes  
24 before needing to sit down or walk around. *Id.* at 897. Dr. Ochoa estimated Plaintiff could sit  
25 about four hours and stand/walk less than two hours total in an eight-hour workday (with normal  
26 breaks). *Id.* Dr. Ochoa determined Plaintiff would need to walk around during an eight-hour  
27 workday every 20 minutes for 5 minutes each time. *Id.*

28 Dr. Ochoa found Plaintiff would sometimes need to take unscheduled 15-minute breaks

1 during a workday every 20 to 30 minutes. *Id.* Dr. Ochoa stated Plaintiff's chronic fatigue, pain/  
2 paresthesias, numbness, and muscle weakness caused a need for these breaks. *Id.* In a marked  
3 degradation in his assessment of Plaintiff's weight-bearing capability since his first exam of her  
4 one year earlier, Dr. Ochoa determined Plaintiff could lift and carry in a competitive work  
5 situation less than 10 pounds rarely, and never anything 10 pounds or over. *Id.* at 898. Dr. Ochoa  
6 opined Plaintiff could occasionally twist, stoop/bend, crouch/squat, climb stairs, and climb  
7 ladders. *Id.* Dr. Ochoa noted Plaintiff could use her hands/fingers/arms to grasp, turn, twist  
8 objects, engage in fine manipulations, and reach in front of the body and overhead, 10% of an  
9 eight-hour workday. *Id.*

10 Dr. Ochoa estimated Plaintiff was likely to be off task 25% of the time during a typical  
11 workday. *Id.* Dr. Ochoa reported Plaintiff was incapable of even "low stress" work due to her  
12 "bipolar condition." *Id.* Dr. Ochoa found Plaintiff's impairments produced mostly bad days. *Id.*  
13 Dr. Ochoa determined Plaintiff was likely to be absent from work more than four days per month.  
14 *Id.* at 898. Dr. Ochoa estimated the earliest date the functional limitations noted above applied to  
15 Plaintiff in 2015. *Id.*

16 As discussed above, the ALJ assigned little weight to the opinion of Dr. Ochoa because it  
17 was inconsistent with the totality of the evidence received at the hearing level. *Id.* at 46-47.  
18 Plaintiff asserts the ALJ failed to provide specific and legitimate reasons to discount Dr. Ochoa's  
19 opinion. (Doc. 18 at 29-33). Plaintiff claims the ALJ "harmfully and erroneously cherry-picks  
20 citations findings in the one-time physical CE examination" performed by Dr. Sachdeva. *Id.* at  
21 31. Plaintiff contends the ALJ mischaracterized "citations to 'Exhibit 4F'" because it is a  
22 gynecological examination and not an applicable orthopedic evaluation. *Id.* at 32.  
23 Plaintiff asserts the ALJ's physical RFC is not supported by substantial evidence as it is not based  
24 on any treating, examining, or reviewing physician. *Id.* at 32. Plaintiff claims the ALJ  
25 improperly interpreted medical data to develop the RFC at issue. *Id.* at 32-33.

26 In response, Defendant argues the ALJ reasonably gave little weight to Dr. Ochoa's  
27 opinion of disabling physical limitations. (Doc. 19 at 10). Defendant claims Dr. Ochoa's  
28 opinions were inconsistent with the totality of the evidence. *Id.* Defendant argues the ALJ



1 provided objective findings that did not support Dr. Ochoa's restrictive limitations in areas such  
2 as lifting, standing, and walking. *Id.* at 10-11. Defendant avers the ALJ is not required to base  
3 the RFC finding on a physician's opinion and it was the responsibility of the ALJ to determine the  
4 RFC. *Id.*

5 The Court finds the ALJ has failed to provide specific and legitimate reasons to discount  
6 the opinion of examining physician Dr. Ochoa. Like Dr. Yadegar, the ALJ provided a  
7 "boilerplate" explanation in assessing the opinions of Drs. Ochoa, Sachdeva, and Lebeau. AR at  
8 46-48. For the same reasons articulated above in connection with finding the ALJ's treatment of  
9 Dr. Yadegar's opinion was erroneous, his use of boilerplate language as to Dr. Ochoa is not  
10 sufficiently specific. *Supra* 19.

11 The ALJ assigned Drs. Ochoa and Sachdeva's opinions little weight and, with verbatim  
12 supporting language, assigned Dr. Lebeau's opinion partial weight. *Id.* at 46-47. The ALJ's  
13 opinion does not indicate why Dr. Ochoa was assigned less weight than Dr. Lebeau, beyond the  
14 conclusory statements that Dr. Ochoa's "opinions are inconsistent with the totality of the  
15 evidence received at the hearing level[,] and Dr. Lebeau's opinion, "to the extent [] is consistent  
16 with the totality of the evidence received at the hearing level. *Id.* It was the ALJ's burden to  
17 identify and resolve this discrepancy. *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984); *see*  
18 *Gray v. Comm'r of SSA*, 365 Fed. App'x 60, 62 (9th Cir. 2010) ("When medical records are at  
19 odds with each other or in any way conflict, it is the ALJ's role to assess and resolve conflicting  
20 medical evidence"). Although the ALJ "summarizes" the physical evidence of record (AR at 43-  
21 44), the ALJ fails to identify why these findings do support Dr. Ochoa's opinion. The Court  
22 cannot speculate as to what evidence received at the hearing level that the ALJ used to assign Dr.  
23 Ochoa's little weight and Dr. Lebeau more. Accordingly, the Court cannot find that the ALJ  
24 provided specific and legitimate reasons supported by substantial evidence to discount Dr.  
25 Ochoa's opinion.

### 26 3. NP Desai

27 As a threshold matter, the Court must determine whether NP Desai qualifies as an  
28 accepted medical source opinion. Under the regulations, applicable to this case, only "licensed



physicians and certain qualified specialists” are considered acceptable medical sources. 20 C.F.R. § 404.1513(a); *see Molina*, 674 F.3d at 1111. Nurse practitioners and physician assistants are “other sources” for claims filed before March 27, 2017. *Dale v. Colvin*, 823 F.3d 941, 943 (9th Cir. 2016). “Other sources cannot establish the existence of a medically determinable impairment” but can provide “special knowledge of the individual and...insight into the severity of the impairment(s) and how it affects the individual’s ability to function.” SSR 06-03P, 2006 WL 2329939, at \*2 (2006). Opinions from “other sources” may be discounted provided the ALJ identifies reasons germane to each source for doing so. *See Popa v. Berryhill*, 872 F.3d 901, 906 (9th Cir. 2017).

Plaintiff argues NP Desai should be treated as an accepted medical source opinion. (Doc. 18 at 20, n. 5). Plaintiff cites to *Benton v. Barnhart*, and *Gomez v. Chater*, for the proposition that, as a member of a treatment team under the supervision of Dr. Dawn Risely, she should be afforded deference under the treating physician rule. *Id.* (citing *Gomez v. Chater*, 74 F.3d 967, 971 (9th Cir. 1996), *Benton v. Barnhart*, 331 F.3d 1030 (9th Cir. 2003)).

The Court finds *Gomez* is distinguishable from this case. In *Gomez*, the Ninth Circuit held that “other” sources constitute an acceptable medical source where they work in conjunction with a physician as part of an interdisciplinary team. 74 F.3d at 971.<sup>6</sup> To trigger this exception there must be evidence of close supervision that the “other source” on the team in essence becomes the agent of the acceptable medical source. *E.g., Ramierz v. Astrue*, 803 F. Supp. 2d 1075, 1081 (C.D. Cal. 2011).

On January 27, 2017, Dr. Risely saw Plaintiff for treatment at Fresno County Mental Health. AR at 631-32. Dr. Risely noted Plaintiff had difficulty communicating, completing sentences, was disorganized, and claimed she was hearing voices. *Id.* at 631. Dr. Risely found Plaintiff’s orientation, intelligence, insight, and judgment were normal, but she was also

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<sup>6</sup> The subsection of the regulation providing the basis for the *Gomez* holding was deleted by an amendment in 2000, and an “interdisciplinary team” was removed from the definition of “acceptable medical sources.” *Vasquez v. Kijakazi*, No. 1:20-cv-00680-SKO, 2022 WL 827002, at \*9 (E.D. Cal. Mar. 18, 2022) (collecting cases). The Ninth Circuit has not directly addressed whether *Gomez* remains good law. *Id.* The Court finds it unnecessary to address the question of *Gomez*’s applicability because the case is distinguishable from this matter.

1 suspicious, alert, depressed, anxious, and blunted. *Id.* Dr. Risely was unable to diagnose Plaintiff  
2 and expressed concern about “methamphetamine intoxication.” *Id.* at 632. Dr. Risely prescribed  
3 Plaintiff Zyprexa. *Id.*

4 Plaintiff saw Dr. Risely for a second time on March 27, 2017. *Id.* at 685-86. Dr. Risely  
5 noted Plaintiff had been provided Prozac by her primary care physician. *Id.* at 685. Dr. Risely  
6 reported Plaintiff felt better on the Prozac, but she was not compliant with her administration of  
7 medications on a regular basis. *Id.* Dr. Risely found Plaintiff was disorganized and “her voices  
8 are exacerbating” after taking Prozac. *Id.* Dr. Risely noted Plaintiff was cooperative, alert, with  
9 normal speech, orientation, insight, judgment, but also malodorous, anxious, and blunted. *Id.* Dr.  
10 Risely expressed concerns that Plaintiff was using illicit substances. *Id.* at 686. Dr. Risely  
11 continued Plaintiff’s prescription for Zyprexa and advised against continuing the Prozac provided  
12 by her primary care physician. *Id.*

13 Apart from these two sessions with Dr. Risely, Plaintiff primarily was treated by NP Desai  
14 at Fresno County Mental Health. NP Desai’s treatment notes and opinions do not demonstrate  
15 that Dr. Risely closely supervised NP Desai, consulted with NP Desai, or otherwise had an  
16 agency relationship with NP Desai. *Id.* at 672-75, 679-82, 885-86, 890-95, 904-08, 952-57.  
17 Moreover, the mental impairment questionnaires submitted by NP Desai setting forth her opinion  
18 regarding Plaintiff’s limitations were not signed by Dr. Risely. *Id.* at 672-75, 679-82, 885-86,  
19 890-95, 904-08; *see Mack v. Astrue*, 918 F. Supp. 2d 975, 983 (N.D. Cal. 2013) (finding that a  
20 social worker was not an acceptable medical source where the mental impairment questionnaire at  
21 issue was prepared and signed by only the social worker); *cf. Swanson v. Comm’r of Soc. Sec.*  
22 *Admin.*, 274 F. Supp. 3d 932, 936-37 (D. Ariz. 2017) (finding nurse practitioner to be an  
23 acceptable medical source where the supervising physician co-signed the medical source  
24 statement prepared by the nurse practitioner). Accordingly, *Gomez* does not support Plaintiff’s  
25 position.

26 Similarly, *Benton* does not apply to this case. In *Benton*, the Court held in determining  
27 whether a physician or other acceptable medical source should be considered a treating physician  
28 with the associated presumption of controlling weight, “[i]t is not necessary, or even practical, to

draw a bright line distinguishing a treating physician from a non-treating physician.” 331 F.3d at 1038 (quoting *Ratto v. Sec’y of Health and Human Servs.*, 839 F. Supp. 1415, 1425 (D. Or. 1993)). “Rather, the relationship is better viewed as a series of points on a continuum reflecting the duration of the treatment relationship and the frequency and nature of the contact.” *Id.* Thus, under *Benton*, to even be considered a treating physician, the source has to be a physician or other *acceptable* medical source. (emphasis added). A nurse practitioner does not fall within the ambit of “acceptable medical sources.” *Cf. Braggs v. Comm’r of Soc. Sec.*, No. 1:19-cv-1135-HBK (SS), 2021 WL 4129657, at \*3 (E.D. Cal. Sep. 10, 2021) (finding *Benton* inapplicable to a chiropractor). Accordingly, the Court concludes that the ALJ needed to give only a germane reason for rejecting NP Desai’s opinion, given she is not an “accepted medical source.”

As discussed above, the ALJ assigned “little weight” to the opinion of NP Desai because the opinion was “inconsistent with the totality of the evidence received at the hearing level.” AR at 47. Then, the ALJ repeated word for word the same reasoning and cited the same exhibits he provided in evaluating five other opinions. *Id.* at 45-49. While the Court has already addressed that this reasoning was neither specific nor legitimate in discounting Dr. Yadegar’s opinion, *supra* 19-20, the Court finds that the ALJ’s reasoning is adequate to reject NP Desai’s opinion.

A conflict with treatment notes or inconsistency with the medical record as a whole are germane reasons to reject an “other source” opinion. *Ghanim v. Colvin*, 763 F.3d 1154, 1161 (9th Cir. 2014). Here, the ALJ presented evidence that Plaintiff was oriented (AR at 559, 666, 952), had organized thought processes (*id.* at 952, 954, 956), normal cognition (*id.* at 954, 956), normal insight and judgment (*id.* 677, 679, 952, 954, 956), intact memory (*id.* 560, 666, 986), that she was cooperative (*id.* at 559, 666, 667, 679), made good eye contact (*id.* at 679, 952, 956), and was friendly (*id.* at 954). The Court finds this evidence was a germane reason supported by substantial evidence to discount NP Desai’s opinion.

Plaintiff argues when rejecting NP Desai’s multiple mental RFC findings, the ALJ failed to discuss “additional significant objective [mental state examination] findings” in treatment records from Fresno Behavioral Health, records from Plaintiff’s involuntary psychiatric holds, or how the findings from Dr. Portnoff comport with NP Desai’s findings. (Doc. 18 at 25-27).

1 However, since the ALJ has provided a germane reason for discounting NP Desai's opinion, the  
 2 ALJ did not err in failing to address Plaintiff's alternative evidence. Therefore, the Court finds  
 3 that the ALJ properly evaluated NP Desai's opinion.

4 \* \* \* \* \*

5 Given the limitations and diagnoses of Drs. Yadegar and Ochoa that were to be given  
 6 "controlling" weight by the ALJ, the Court cannot find the above errors harmless and, instead,  
 7 concludes that a different disability determination could have been reached had the opinions been  
 8 afforded the appropriate weight. *See Tommasetti*, 533 F.3d at 1038 (error may be harmless only if  
 9 "inconsequential" to disability determination).

10 **B. Whether the ALJ Erred by Failing to Provide "Clear and Convincing**  
 11 **Reasons for Rejecting Plaintiff's Symptomology Evidence.**

12 Because the Court finds reversal is warranted, the undersigned declines to adjudicate  
 13 Plaintiff's separate claim of error regarding the ALJ's evaluation of Plaintiff's subjective  
 14 complaints. *See Marcia v. Sullivan*, 900 F.2d 172, 177 n.6 (9th Cir. 1990) ("Because we reverse,  
 15 we do not reach the other arguments raised."); *see also Hiler v. Astrue*, 687 F.3d 1208, 1212 (9th  
 16 Cir. 2012) (same); *Augustine ex rel. Ramirez v. Astrue*, 536 F. Supp. 2d 1147, 1153 n.7 (C.D. Cal.  
 17 2008) ("[The] Court need not address the other claims plaintiff raises, none of which would  
 18 provide plaintiff with any further relief than granted, and all of which can be addressed on  
 19 remand."); *Pendley v. Heckler*, 767 F.2d 1561, 1563 (11th Cir. 1985) (per curiam) ("Because the  
 20 'misuse of the expert's testimony alone warrants reversal,' we do not consider the appellant's  
 21 other claims.").

22 **V. REMEDY**

23 The decision whether to remand a matter pursuant to sentence four of 42 U.S.C. § 405(g)  
 24 or to order immediate payment of benefits is within the discretion of the district court. *Harman v.*  
 25 *Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000). Plaintiff requests the Court remand this case for  
 26 payment of benefits based on the credit-as-true rule. (Doc. 18 at 37). Generally, an award of  
 27 benefits is directed when:

28 ///

(1) the ALJ has failed to provide legally sufficient reasons for rejecting such evidence, (2) there are no outstanding issues that must be resolved before a determination of disability can be made, and (3) it is clear from the record that the ALJ would be required to find the claimant disabled were such evidence credited.

*Smolen*, 80 F.3d at 1292. In addition, an award of benefits is directed where no useful purpose would be served by further administrative proceedings, or where the record is fully developed. *Varney v. Sec’y of Health & Human Serv.*, 859 F.2d 1396, 1399 (9th Cir. 1998). Even if all the conditions for an award of benefits are met, the Court nevertheless retains “flexibility to remand for further proceedings when the record as a whole creates serious doubt as to whether the claimant is, in fact, disabled within the meaning of the Social Security Act.” *Garrison*, 759 F.3d at 1021; *see Dominguez v. Colvin*, 808 F.3d 403, 407 (9th Cir. 2015).

Defendant argues “there are outstanding issues that would need to be addressed and there is serious doubt as to Plaintiff’s disability, precluding an award of benefits.” (Doc. 19 at 15). Defendant contends there are significant inconsistencies in the medical record that require further administrative proceedings. *Id.*

The Court finds that based on the ALJ’s opinion and the Court’s review of the record, serious doubts exist as to whether Plaintiff is in fact disabled due to her mental and physical impairments. The Court orders this action remanded for further administrative proceedings consistent with this opinion, and to further develop the record as deemed necessary.

## VI. CONCLUSION AND ORDER

Based on the foregoing, the Court finds that the ALJ erred in failing to provide specific and legitimate reasons supported by substantial evidence in the record to discount Drs. Yadegar and Ochoa’s opinions. Accordingly, IT IS HEREBY ORDERED:

1. Plaintiff’s motion for summary judgment (Doc. 18) is GRANTED;
2. That the decision of the Commissioner is reversed, and this matter is remanded back to the Commissioner of Social Security for further proceedings consistent with this order; and
3. The Clerk of Court is DIRECTED to enter judgment in favor of Plaintiff Maxine

1 Martinez and against Defendant Martin O'Malley, Commissioner of the Social  
2 Security Administration.

3 IT IS SO ORDERED.

4 Dated: May 29, 2024

5   
UNITED STATES MAGISTRATE JUDGE